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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

—v.—

JOHN D. ASHCROFT, in His Official Capacity as Attorney General,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE* THE INTERNATIONAL COALITION FOR COPYRIGHT PROTECTION IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

With the written consent of all parties, reflected in letters on file with the Clerk, the International Coalition for Copyright Protection (ICCP) submits this brief as *amicus curiae*, pursuant to Rule 37 of the Rules of this Court.[1]

The ICCP is an organization formed by authors, illustrators, artists, songwriters and publishers for the protection of copyrights. All of its members depend upon copyright protection to exercise some legal control over the use of their creative work and to ensure that they receive adequate compensation when that work is published or performed. Many of its members depend upon copyright protection in the European Union, the extent of which depends upon the degree of protection afforded under United States law.

Members of the ICCP include Algis Budrys, Kevin J. Anderson, Rebecca Moesta, Will Eisner, Leo Dillon, Diane Dillon, Brad Lineweaver, Lydia Van Vogt, Vincent DiFate, Judith Holman, Kevin Holman, K.D. Wentworth, William J. Widder, Dateline Communications, Laura Freas, Frank Kelly Freas, Frank Frazetta, Scott E. Sutton, Susan Sutton, Author Services, Inc., Hollywood Writer's Society, Neil Gaiman, Gregory Benford, H.R. Van Dongen, Nina Kiriki Hoffman, Edd Cartier, Dean Cartier, Georgina Cartier, Joseph Wrzos, Helen de la Ree, and Artist Space.

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[1] No counsel for a party authored the brief in whole or in part, and no person or entity, other than the amicus curiae or its members, made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The Sonny Bono Copyright Term Extension Act ("CTEA"), Pub. L. No. 105-298, 112 Stat. 2827 (1998), is a valid exercise of Congress' plenary power to regulate commerce with foreign nations and, independently, of Congress' Copyright Clause authority. *See* U.S. Const., art. I, § 8, cl. 3; *Id.* at cl. 8. Because the government persuasively argues that the statute is authorized by the Copyright Clause, this brief focuses on a separate source of legislative power that adequately supports the CTEA: the Foreign Commerce Clause.

As the statute's legislative history demonstrates, a central purpose of the CTEA is to regulate foreign traffic in copyrighted materials between the United States and member countries of the European Union. As a result of a Directive issued by the Council of European Communities, prior to the CTEA American copyright-owners were entitled to less copyright protection than European copyright-owners in overseas markets. By extending the copyright term for American works sold in Europe, the CTEA places Americans and Europeans on equal footing when competing for revenues within the European Union. One of the chief objectives of the statute is therefore to regulate foreign commerce by removing a competitive disadvantage faced by the American copyright industry when marketing its goods abroad.

As numerous decisions of the Court have established, Congress possesses sufficient authority to enact a statute so long as any grant of legislative power adequately supports the law. Accordingly, the fact that a particular congressional act exceeds the power granted by one constitutional provision is not fatal to the act, provided that an independent grant of power is sufficient. Thus, for example, trademark law is a valid exercise of the commerce power notwithstanding that it exceeds the author-

ity granted by Article I, § 8, cl. 8. Similarly, Congress may abrogate the States' Eleventh Amendment immunity when acting pursuant to Section 5 of the Fourteenth Amendment, but not when acting pursuant to the Commerce Clause or other Article I powers. Analogously, the CTEA would remain a valid exercise of the Foreign Commerce power even if the Court were to agree with petitioners that the law is not supported by the Copyright Clause.

The CTEA does not warrant heightened First Amendment scrutiny. As the Court has already made clear, copyright law leaves ample breathing room for the First Amendment by incorporating free speech protections such as the idea/expression dichotomy and the fair use doctrine. There is no significant First Amendment interest relating specifically to copyright duration, such that extending the term of copyright protection should trigger heightened First Amendment scrutiny. In any event, the CTEA furthers the substantial governmental purpose of eliminating unfair treatment of the American copyright industry abroad, and burdens no more speech than is necessary to accomplish that goal, so the statute survives even the scrutiny that petitioners urge the Court to apply.

ARGUMENT

I. THE CTEA IS A VALID EXERCISE OF CONGRESS' POWER TO REGULATE COMMERCE WITH FOREIGN NATIONS

Petitioners' arguments in this Court and the courts below consistently presume that the only grant of congressional power in the Constitution that could authorize the CTEA's extension of copyright protection is the Copyright Clause in combination with the Necessary and Proper Clause. *See* U.S. Const., art. I, § 8, cl. 8; *Id.* art.

I, § 8, cl. 18. The presumption is incorrect.[2] As the statute's legislative history makes clear, the CTEA was enacted in order to adjust trade relations between the United States and other nations with regard to copyrighted materials. *See* S. Rep. No. 104-315, at 3 (1996) ("The *purpose* of the bill is to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works.") (emphasis added).[3] Indeed, Congress found that absent

[2] *Amicus* ICCP fully agrees with the government's position that the CTEA is authorized by the Copyright Clause, and nothing in this brief is intended to suggest otherwise. Rather, the arguments below demonstrate that irrespective of whether the copyright power supports the CTEA, the statute is adequately supported by the foreign commerce power.

[3] *See also* S. Rep. No. 104-315, at 5 ("In order *to safeguard the Nation's economic interests* and those of America's creators in the *protection of copyrighted works abroad*, Senator Hatch, Senator Feinstein and Senator Thompson introduced the Copyright Term Extension Act . . . .") (emphasis added); 144 Cong. Rec. S.12377-01, S12377 (Statement of Senator Hatch) ("The *main purpose* of the [CTEA] is to ensure adequate copyright *protection for American works abroad* by extending the U.S. term of copyright protection for an additional 20 years.") (emphasis added). The Executive Branch similarly pointed to the anticipated effect on foreign commerce when explaining the Executive's support of the CTEA. *See The Copyright Term Extension Act of 1995: Hearing Before the Senate Committee on the Judiciary*, S. Hrg. 104-817, 104th Cong. 1st Sess. (Sept. 20, 1995) (Statement of Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks) ("[T]here are several reasons that a copyright term increase may be warranted. *Most notably*, the bill would provide U.S. copyright owners benefits in other countries and in international fora. Accordingly, we support the twenty-year extension of copyright protection . . . .") (emphasis added); *id.* ("The *primary reason* for changing the copyright term by twenty years would be to bring U.S. law into conformity with that of the European Union.") (emphasis added); *id.* ("Extending the term of copyright protection by twenty years may also benefit the U.S. economy and, *in particular*, the U.S. trade balance.") (emphasis added).

the remedial measures effected by the CTEA, "[t]he United States stands to lose a significant part of its international trading advantage." *Id.* at 10. Properly viewed as a statute intended to maintain an existing trade surplus in America's second-largest export industry, and to counteract unfair treatment overseas of a sector of the American economy that employs more workers than any single manufacturing sector, the CTEA is a valid exercise of Congress' power "to regulate commerce with foreign nations." U.S. Const., art. I, § 8, cl. 3.[4]

A. The Foreign Commerce Purpose and Effect of the CTEA

To understand how the CTEA affects foreign commerce, and thus to discern Congress' purposes in enacting the statute, it is first necessary to understand the European Union's "rule of the shorter term" for copyrights. Prior to the CTEA, the term of copyright protection in the United States for most works was lifetime of the author plus 50 years, the minimum period necessary to comply with the Berne Convention[5] and the Trade-Related Aspects of Intellectual Property ("TRIPS") Agreement.[6] In 1993, the Council of the European Com-

[4] That Congress did not expressly cite the Foreign Commerce Clause as authorization for the CTEA does not prevent the Court from upholding the statute under that Constitutional provision. " '[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.' " *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983), *superseded by stat. on other grounds* (quoting *Woods v. Miller Co.*, 333 U.S. 138, 144 (1948)).

[5] *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, art. 7, 828 U.N.T.S. 221.

[6] *See* TRIPS, art. 9(1), reprinted in 33 Intl. Legal Mat. 1197, 1201.

munities issued a Directive ("EU Directive") requiring member states to harmonize their copyright laws by setting the period of copyright protection at lifetime of the author plus seventy years—*i.e.*, twenty years longer than the copyright period in the United States. *See* Council Directive 93/98, 1993 O.J. (L 290/9), art. 1.[7] The EU Directive also mandates implementation of the "rule of the shorter term," under which works originating in non-member nations, such as the United States, will receive copyright protection for no longer than the term of copyright in the country of origin. *Id.* at art. 7. The upshot is that under the EU Directive creative works from the United States would be eligible for less copyright protection than works from the European Union.

The CTEA remedies this imbalance. By extending American copyrights for twenty years, the statute allows American works to receive copyright protection in the European Union for a term of lifetime of the author plus seventy years, the same period available for European works. The CTEA thus maximizes the potential economic returns from exploitation of American creative works abroad, and eliminates a disadvantage that the American copyright industry would otherwise suffer when competing with European industries for revenues within the European Union.[8] The CTEA, then, is protective economic legislation directed at international commerce, and is therefore akin to statutes imposing tariffs or customs duties, or any law intended to strengthen the hand of American industries against foreign competition.[9]

[7] "According to the Copyright Office, all the states of the European Union have now brought their laws in compliance with the directive. And, as the Register of Copyrights has stated, those countries that are seeking to join the European Union, including Poland, Hungary, Turkey, the Czech Republic, and Bulgaria, are likely, as well, to amend their copyright laws to conform with the life-plus-70 standard." 144 Cong. Rec. S12377-01, S12378 (October 12, 1998) (Statement of Senator Hatch).

[8] The fact that the CTEA increases the duration of copyrights for "works made for hire," generally owned by corporations, to ninety-five years from seventy-five years, while the analogous protection in the European Union lasts for only seventy years, does not undercut this rationale for the Act. As the Senate Report explains, corporate works in the European Union often receive protection for the life of some individual plus seventy years, where those same works in the United States would be deemed works made for hire, and would therefore receive copyright protection for a shorter period:

> [W]ith few exceptions, the countries of the European Union do not recognize the work-made-for-hire doctrine. The closest corollary is the European doctrine of "collective works or works created by a legal person," which generally affords protection for 70 years from the date a work is made publicly available . . . However, in many, if not most cases, this category does not include works that U.S. law protects as works made for hire. For example, in Germany, which has implemented the EU Directive and which does not recognize the work-made-for-hire doctrine, the basic term of life-plus-70 applies to newspaper, magazine, and journal articles where the author is identified, regardless of whether the article was prepared in the scope of the author's employment. Similar protection is applied to books and musical works. Where these works are prepared as works made for hire, they are protected in the United States for the shorter of 75 years from publication or 100 years from creation. In many such cases, the European life-plus-70 term would provide greater protection than the fixed 75-year term in the United States. Thus, the application of the rule of the shorter term will result in less protection for these works in the countries of the European Union than they might otherwise have.

S. Rep. No. 104-315, at 15-16 (internal citations omitted).

[9] In addition, the CTEA furthers the foreign policy goal of harmonizing United States copyright law with the laws of important trading partners. During legislative hearings on the CTEA, Congress heard testimony from the Register of Copyrights that "[t]he Copyright

As such, the CTEA is plainly a necessary and proper exercise of Congress' foreign commerce power. "The plenary authority of Congress to regulate foreign commerce . . . is well established." *California Bankers Assoc. v. Shultz*, 416 U.S. 21, 59 (1974). "Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater." *Japan-Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 448 (1979). International traffic in copyrighted materials is no less subject to Congress' Foreign Commerce Clause authority than international traffic in any commodity. *See Bd. of Trustees of University of Illinois v. U.S.*, 289 U.S. 48, 56 (1933) (The Foreign Commerce Clause " 'comprehend[s] every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend.' ") (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

Congress' plenary authority to regulate international commercial activity would be of little value if it could not be used to protect American individuals and industries from threats by foreign competitors. Drawing from extensive testimony before the Senate Committee on the Judiciary, the Senate Report on the CTEA clearly sets out the threat to which the statute responds, as well as the importance of the goal accomplished by the CTEA to the national economy:

Office believes harmonization of the world's copyright laws is imperative if there is to be an orderly exploitation of copyrighted works." *The Copyright Term Extension Act of 1995: Hearing Before the Senate Committee on the Judiciary*, S. Hrg. 104-817, 104th Cong. 1st Sess. (Sept. 20, 1995) (Statement of Marybeth Peters, Register of Copyrights and Associate Librarian of Congress for Copyright Services).

America exports more copyrighted intellectual property than any country in the world, a huge percentage of it to nations of the European Union. In fact, intellectual property is our second largest export, with U.S. copyright industries accounting for roughly $40 billion in foreign sales in 1994. For nearly a decade, U.S. copyright industries have grown at twice the rate of the overall economy. And, according to 1993 estimates, copyright industries account for some 5.7 percent of the total gross domestic product. Furthermore, copyright industries are creating American jobs at twice the rate of other industries, with the number of U.S. workers employed by core copyright industries more than doubling between 1977 and 1993. Today, these core copyright industries contribute more to the economy and employ more workers than any single manufacturing sector, accounting for more than 5 percent of the total U.S. workforce.

. . . . *The United States stands to lose a significant part of its international trading advantage if our copyright laws do not keep pace with emerging international standards*. Given the mandated application of the "rule of the shorter term" under the EU Directive, American works will fall into the public domain 20 years before those of our European trading partners, undercutting our international trading position and depriving copyright owners of two decades of income they might otherwise have. . . . [The CTEA] will ensure fair compensation for the American creators whose efforts fuel the intellectual property sector of our economy by allowing American copyright owners to benefit to the fullest extent from foreign uses and will, at the same time, ensure that our trading partners do not get a free ride from their use of our intellectual property.

S. Rep. No. 104-315, at 9-10 (internal footnotes omitted) (emphasis added).

B. The CTEA Reaches No Further Than Is Necessary to Achieve Congress' Foreign Commerce Objectives

The mere fact that in addressing this threat Congress modified the term of United States copyright protection does not place the CTEA outside the scope of the Foreign Commerce Clause, such that the statute could be authorized only by the Copyright Clause. As a preliminary matter, the CTEA's effect on domestic copyrights is no reason to doubt that the statute's primary purpose is, as stated in the Senate Report, "to safeguard the Nation's economic interests and those of America's creators in the protection of copyrighted works abroad." S. Rep. No. 104-315, at 5. Because the rule of the shorter term makes copyright protection in EU countries dependent on protection in the copyright holder's country of origin, Congress could not have leveled the playing field overseas without extending the copyright period in the United States. Nor could Congress practicably have increased the term of protection only for those works actually exploited in an EU member country, as this would result in inconsistent protection amongst similar works within the United States, presenting serious administrative difficulties, and would encourage copyright holders to arrange otherwise nonproductive European uses in order to secure twenty additional years of protection. In short, the domestic impact of the CTEA is an essential incident to the statute's substantial and legitimate goal of protecting American industries engaged in foreign commerce. The statute is therefore a necessary and proper exercise of a power entrusted to Congress. *See* U.S. Const., art. I, § 8, cl. 18.

Also essential if the CTEA is to achieve its intended foreign commerce objective is the statute's application to subsisting copyrights, or "retroactive application" in petitioners' terminology.[10] Limiting the term extension to prospective copyrights would have meant that the rule of the shorter term would continue to provide EU works with a competitive advantage over American works sold in the EU for at least fifty years, and in most cases significantly longer. Such deferred implementation could hardly be deemed responsive to a present threat to a vital sector of the United States economy. Where, as here, Congress has made an informed and considered judgment that immediate legislative action is necessary to protect American interests in foreign affairs and commerce, it is not the role of the Court to impose a different policy.

C. In Appropriate Circumstances the Foreign Commerce Clause May Support Legislation That Exceeds the Limitations of Another Grant of Authority

Upholding the CTEA under the Foreign Commerce Clause would be fully consistent with the Court's jurisprudence regarding use of the Commerce Clause to support legislation affecting matters potentially within

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[10] Petitioners assert that "[t]his Court has never decided whether Congress has the power, consistent with the 'limited Times' requirement, to extend the terms of existing copyrights." Pet. Op. Br. at 17. But the Court has determined that Article I, § 8, cl.8 permits retroactive amendments to patent law. *See McClurg v. Kingsland*, 42 U.S. 202, 206 (1843) ("[T]hough [changes to the patent law] may be retrospective in their operation, that is not a sound objection to their validity; the powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution, and as there are no restraints on its exercise, there can be no limitation of their right to modify them at their pleasure, so that they do not take away the rights of property in existing patents.").

the purview of other grants of congressional authority. As a general matter, a regulation arguably permissible under two grants of congressional power may be authorized by one of those grants even if not authorized by the other, and even if the constitutional provision found to contain sufficient authority for the law is not the one on which Congress had intended to rely. Thus, after determining that a nineteenth-century criminal trademark statute was not within Congress' Copyright Clause authority—the power, the Court inferred, that Congress had intended to exercise in enacting the statute—the Court went on to consider whether regulation of trademarks was permissible under the Commerce Clause. *See The Trade-Mark Cases*, 100 U.S. 82, 93-94 (1879). Although the Court invalidated the statute under the then-prevailing understanding of Congress' commerce power, modern trademark protection, though presumably still unsupported by the Copyright Clause, "is built entirely on the Commerce Clause." *United States v. Moghadam*, 175 F.3d 1269, 1278 (11th Cir. 1999).

Another decision of the Court demonstrating that the commerce power may authorize legislation that narrowly exceeds a different grant of authority in Article I, § 8 is *Bd. of Trustees of Univ. of Illinois v. United States*, 289 U.S. 48 (1933). In *Bd. of Trustees*, the Court considered the University of Illinois' contention that it should be exempt from paying customs duties when importing goods in furtherance of its educational mission. Such duties, the University argued, are taxes, and therefore unconstitutional if levied against state instrumentalities, such as the University, for the performance of governmental functions. *See id.* at 57-58. Rejecting the University's argument, the Court explained: "It is true that the taxing power is a distinct power; that it is distinct from the power to regulate commerce. It is also true that the taxing power embraces the power to lay duties. But

because the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to regulate [foreign] commerce." *Id.* at 58 (internal citations omitted).

The lower courts as well have recognized that in appropriate circumstances the Commerce Clause may authorize legislation where other Article I powers would not suffice. In *The Authors League of America, Inc. v. Oman*, 790 F.2d 220 (2d Cir. 1986), for example, the Second Circuit considered a constitutional challenge to the so-called "manufacturing clause," a now defunct provision that denied full copyright protection to English-language non-dramatic literary materials manufactured outside of the United States or Canada. *See id.* at 221; 17 U.S.C. § 601 (1985). Congress' objective in so limiting the scope of copyright protection, the court explained, was "to protect domestic labor and manufacturers in the printing and publishing industry. This legislation seeks to encourage the use of American printers . . . ." *Id.* Like petitioners in the instant case, plaintiffs in *Authors League* argued that the challenged provision was beyond Congress' Copyright Clause authority because the statute had only a tenuous connection to the promotion of progress in science. *See id.* at 224. Rejecting the challenge, the court explained: "What plaintiffs' argument fails to acknowledge . . . is that the copyright clause is not the only constitutional source of congressional power that could justify the manufacturing clause. In our view, denial of copyright protection to certain foreign-manufactured works is clearly justified as an exercise of the legislature's power to regulate commerce with foreign nations." *Id*; *see also Moghadam*, 175 F.3d at 1280 ("[I]n some circumstances the Commerce Clause may indeed be used to accomplish that which may not have been permissible under the Copyright Clause."); 3 Melville

B. Nimmer & David Nimmer, *Nimmer on Copyright* § 9A.07[B], at 9A-80-81 (arguing that legislation affecting copyrights may adequately be supported by Congress' power to implement treaties and to regulate commerce, even if not supported by the Copyright Clause).[11]

The Court need not determine that the CTEA exceeds the Copyright Clause in order to find that the statute is authorized by the Foreign Commerce Clause, as the commerce power may overlap with other grants of authority. This is evident from *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), in which the Court looked to the Commerce Clause to uphold the Civil Rights Act of 1964 against constitutional challenge. While the government had sought support for the statute under Section 5 of the Fourteenth Amendment as well, the Court declined to reach that issue, noting that since "Congress possessed ample power [under the Commerce Clause] we have . . . not considered the other grounds relied upon [by the government]." *Id.* at 250. The Court went on to observe that its reliance on the Commerce Clause to uphold the Civil Rights Act in no way undercut the possibility that the statute was also within Congress' Section 5 authority. *See id.* ("This is not to say that [Section 5] was not adequate . . . ."); *cf. id.* at 280 (Douglas, J., concurring) ("I would prefer to

[11] To the same effect is *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002) (Whyte, J.), upholding the Digital Millennium Copyright Act ("DMCA"), Pub L. No. 105-304, which *inter alia* prohibits circumvention of digital anti-piracy controls and limits the copyright liability of Internet service providers who transmit copyrighted materials. The statute was enacted to implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. *See* S. Rep. 105-190 (1998), at 2. The defendant in *Elcom* moved to dismiss the indictment on the ground that the DMCA exceeds Congress' Copyright Clause authority. The court denied the motion, finding that Congress possessed sufficient authority to enact the law under the Commerce Clause. *See id.*, slip op. at 26-32.

rest on the assertion of legislative power contained in § 5 of the Fourteenth Amendment . . . ."); *see also Bd. of Trustees, supra.*

The Court employed a similar analysis almost twenty years later in *EEOC v. Wyoming*, 460 U.S. 226 (1983), which upheld an amendment to the Age Discrimination in Employment Act ("ADEA") extending the statute's protection to employees of state and local governments. After concluding that the challenged amendment "was a valid exercise of Congress's powers under the Commerce Clause," the Court observed that "[w]e need not decide whether it could also be upheld as an exercise of Congress's powers under § 5 of the Fourteenth Amendment." *Id.* at 243; *see also Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 82-83 (2000) (concluding that the ADEA is not appropriate section 5 legislation).

D. When Exercising Its Power Over Foreign Affairs, Congress May Enact Legislation That Would Be Impermissible in a Purely Domestic Context

The principle that the limitations on congressional power will vary according to which grant of power is exercised is particularly significant where, as here, Congress acts in the arena of international affairs, over which the political departments have plenary authority.[12]

[12] *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 (2000) ("[T]he nuances of the foreign policy of the United States are much more the province of the Executive Branch and Congress than of this Court.") (internal quotations omitted); *Regan v. Wald*, 468 U.S. 222, 242 (1984) ("Matters relating to the conduct of foreign relations are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.") (internal quotation omitted); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what

As the Court has made clear, a congressional act not authorized by the Constitution may later become authorized if the subject matter acted upon takes on an international dimension. Thus, in *Missouri v. Holland*, 252 U.S. 416 (1920), the Court upheld the Migratory Bird Treaty Act of 1918, notwithstanding that purely domestic legislation similarly prohibiting the killing of migratory birds within the United States had previously been invalidated. "It is obvious," the Court explained, "that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could . . . ." *Id.* at 433. Accordingly, "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." *Id.* at 432; *see also United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 125 (1973) ("Import restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad, comprehensive powers '(t)o regulate Commerce with foreign Nations.' ").

E. Upholding the CTEA Under the Foreign Commerce Clause Would Not Eradicate From the Constitution Any Limitation on Congressional Power

In *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982), the Court considered a statute giving employees of a recently insolvent railroad preferential

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may be done in the exercise of this political power is not subject to judicial inquiry or decision."); *cf. Barclays Bank PLC v. Franchise Tax Bd. of Calif.*, 512 U.S. 298, 327-28 (1994) (Judiciary lacks authority to assess whether method of state taxation of multinational corporations presents undue threat of economic retaliation by foreign nations).

treatment in the disbursement of assets from the bankruptcy estate. Because the challenged statute by its plain terms affected only a single regional railroad, the Court struck down the law as unsupported by Congress' power to enact "*uniform* Laws on the subject of Bankruptcies throughout the United States." U.S. Const., Art. I, § 8, cl. 4 (emphasis added). The Court observed that bankruptcy laws, such as the law challenged, could not be enacted under the independent authority of the Commerce Clause, which contains no uniformity requirement. "[I]f we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause," the Court explained, "we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws." *Id.* at 468-69.

Railway Labor Executives stands for the proposition that a grant of congressional authority will not be interpreted in a manner that renders a constraint on the exercise of a separate grant of authority inoperative in any and all circumstances—*i.e.*, a manner that "eradicate[s] from the Constitution a limitation on [Congress'] power." Accordingly, the Interstate Commerce Clause will not authorize bankruptcy legislation because, if it would, the uniformity requirement of the Bankruptcy Clause would never again restrain a congressional act. Put differently, the Commerce Clause will not be construed so that the term "uniform" in the Bankruptcy Clause becomes, in the parlance of statutory interpretation, mere surplusage.

In contrast, where one grant of power would allow Congress to enact legislation in excess of another grant, but the limitations of the latter would still be effective in other circumstances, Congress may rely on the grant that contains sufficient authority. Thus, although trademark law gives "exclusive rights" to "writings" in a manner

that exceeds the authority granted by Article I, § 8, cl. 8, *see The Trade-Mark Cases*, *supra*, protection of trademarks is nonetheless permissible under the modern interpretation of the commerce power. Similarly, while anti-discrimination statutes may be authorized by either the Commerce Clause or Section 5 of the Fourteenth Amendment, "when properly exercising its power under § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers." *EEOC v. Wyoming*, 460 U.S. at 243 n.18. Laws that concedely go beyond Congress' powers of taxation or regulation of interstate commerce may nevertheless be enacted when done in the context of foreign commerce or foreign relations. *See Bd. of Trustees*, *supra*; *Missouri v. Holland*, *supra*. In each of these examples, the fact that a congressional act exceeds the limitations of one grant of authority does not prevent the act from being authorized by a different grant.

So too with the CTEA. Even if it were true—and it is not—that the statute is unsupported by the Copyright Clause, the CTEA would nonetheless be a valid exercise of the foreign commerce power for, as the Court wrote of a different statute, "[t]he purpose to regulate foreign commerce permeates the entire congressional plan." *Bd. of Trustees*, 289 U.S. at 58; *cf. Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496 (1983). As noted, if not for the CTEA Congress could not have carried out its legitimate objective of placing the American copyright industry on equal footing with its competition in foreign markets. The CTEA is distinguishable from most other legislation affecting copyrights in that here the statute's domestic impact is a necessary incident to its "main purpose" of regulating foreign commerce. 144 Cong. Rec. S.12377-01, S12377. Upholding the CTEA under the Foreign Commerce Clause in these circumstances could not "eradicate from the Constitution" any constraint on

the copyright power, as ordinary copyright legislation would remain subject to the limitations contained in the Copyright Clause.

Finally, neither *Railway Labor Executives* nor any decision of the Court suggests that the limitations contained in the Copyright Clause operate as an affirmative prohibition on Congress regardless of what grant of authority Congress exercises. The provisions of Article I, § 8 of the Constitution, including the Copyright Clause, are limited grants of power. Each one authorizes Congress to take certain legislative actions, subject to the limitations of the particular grant of authority at issue. It is in the following section, Article I, § 9, and in the Bill of Rights and certain other Amendments that the Constitution lays down overarching prohibitions which Congress may not transgress no matter what power it exercises. *Railway Labor Executives* does nothing to alter this plain aspect of constitutional structure, recognized and relied upon in the cases discussed *supra* in Parts I.C and I.D.

II. THE COURT CAN AND SHOULD DECIDE WHETHER THE CTEA IS AUTHORIZED BY THE FOREIGN COMMERCE CLAUSE EVEN THOUGH THE QUESTION WAS NOT CONSIDERED BY THE CIRCUIT COURT OR EXPRESSLY PRESENTED IN THE PETITION FOR CERTIORARI

It is beyond dispute that the Court may, if it chooses, resolve the legal question whether Congress had sufficient authority under the Foreign Commerce Clause to enact the CTEA. As the Court has explained, "consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals is not beyond [the Court's] power, and in appropriate circumstances [the Court] ha[s] addressed

them." *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980) (citing *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 66, 68-69 (1938); *Vachon v. New Hampshire*, 414 U.S. 478 (1974); *Moragne v. States Marine Lines*, 398 U.S. 375 (1970); *Silber v. United States*, 370 U.S. 717 (1962)).

Accordingly, in *Vance* the Court considered an issue not raised in the Court of Appeals and not presented in the certiorari petition after finding "some merit" in the government's contention that the "issue is an essential, or at least an advisable, predicate to an intelligent resolution of the constitutionality of" the challenged provision. *Vance*, 444 U.S. at 258 n.5; *see also Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990) (resting decision on an issue not raised in the lower courts and not argued by the parties but "ultimately dispositive of the present dispute"); *Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6 (1980) (deciding a state action question not presented to the Court of Appeals); *cf. McCleskey v. Zant*, 499 U.S. 467, 522-23 (1991) (Marshall, J., dissenting) (noting that the decision rested on the resolution of an issue not presented in the lower courts and evidently not anticipated by the parties).

Indeed, the Court has ample authority to decide even significant constitutional questions that have been raised only by *amicus curiae*. Thus, in *Teague v. Lane*, 489 U.S. 288, 300 (1989), the Court did not hesitate to adopt a new retroactivity standard, although "[t]he question of retroactivity . . . has been raised only in an *amicus* brief." Similarly, in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court for the first time applied the exclusionary rule to the States, a course of action proposed only by *amicus curiae*. *See id.* at 646 n.3; *cf. Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or

claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.").

In the instant case, consideration of the Foreign Commerce Clause is essential to intelligent resolution of the questions presented. Petitioners urge the Court to invalidate a federal statute, partly on the ground that Congress lacked sufficient authority to enact it. Cases concerning the limits of constitutional grants of authority call for more flexibility regarding arguments not raised below than do cases in which a statute is challenged solely on the ground that, for example, it violates a provision of the Bill of Rights. This flexibility is necessary because the refusal to consider other potentially relevant grants of power may well produce an intolerable result: the invalidation of a federal statute that Congress had sufficient authority to enact. *See United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.").

Moreover, as discussed below, recognition of the CTEA's foreign commerce purpose will become critical in the event the Court agrees with petitioners that the statute should be subjected to intermediate First Amendment scrutiny. No accurate analysis of the substantiality and legitimacy of the government's interests in enacting the CTEA, nor of whether the statute's burden on speech is essential to the advancement of those interests, may be undertaken without taking account of the statute's primary purpose of affecting foreign trade in copyrighted materials.

For these reasons, the Court should not invalidate the CTEA under either rationale asserted by petitioners without first giving full consideration to the applicability of the Foreign Commerce Clause and to the statute's intended effect on foreign commerce. If the Court finds that these matters are not adequately presented to permit such consideration, then the appropriate course of action would be to call for supplemental briefing or to remand to the Court of Appeals for further proceedings.

III. THE CTEA IS CONSISTENT WITH THE FIRST AMENDMENT

A. The Court of Appeals Correctly Concluded That Heightened First Amendment Scrutiny Is Not Applicable to a Statute Establishing Copyright Protection, and That the CTEA Does Not Unconstitutionally Abridge Freedom of Expression

Petitioners argue that the First Amendment imposes a discrete limit on the duration of copyright, and moreover, apparently a limit that is independent from the "limited times" requirement imposed by the Copyright Clause. Petitioners identify two injuries from term extension that allegedly implicate First Amendment rights and, petitioners argue, are not ameliorated by "the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by [the] fair use [doctrine]." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985). First, petitioners contend that "[t]he constitutional interest in the public domain is an interest in guaranteeing access not just to the author's ideas"—which may be exploited irrespective of copyright—"but also his expression."

Second, petitioners contend that the fair use doctrine inadequately protects would-be *commercial* exploiters of copyrighted expressions, while apparently conceding that fair use does vindicate the First Amendment interests of *noncommercial* actors. Pet. Op. Br. at 36.

The interests identified by petitioners are of no, or at best minor, First Amendment significance. For purposes of the First Amendment, what is critical is that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Except for purposes of criticism or parody—for which the fair use doctrine shields the speaker from copyright liability—little is added to public debate and the process of collective self-governance when *A* gains a right to *B*'s unique expressions,[13] particularly, as will generally be the case, when the expressions at issue have already been made available to the public. Similarly, *A*'s interest in deriving commercial profits from *B*'s creation is not one that raises concerns of governmental suppression of ideas or of free and open debate. Indeed, whose coffers are filled by commercial transactions involving speech is hardly a First Amendment issue at all. It is not, that is, a question of whether ideas and viewpoints will be available for public consideration; it is simply a question of who will be enriched when an author's creations generate commercial revenues.

The important fact for First Amendment purposes is that the exchange of ideas shall remain untrammelled by government action. It is significant, then, that the term extension effected by the CTEA will not prevent any idea from competing against others in the marketplace.

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[13] In those rare cases where an idea is inseparable from its form of expression, the so-called "merger doctrine" precludes copyright liability for exploitation of the relevant expressions. *See, e.g., Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 35-36 (1st Cir. 2001).

Indeed, the CTEA will not even prevent any *expression* from being distributed to the public—at least no expression that the author has seen fit to publish. Congress ensured as much by including in the CTEA a provision stating that during the last twenty years of the copyright of a published work—*i.e.*, during the period added by the CTEA—a library or archive "may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research," provided that the work is not "subject to normal commercial exploitation" or cannot "be obtained at a reasonable price." 17 U.S.C. § 108(h).

In sum, no separate and free-standing constraint on copyright duration is imposed by the First Amendment. This is not to say, of course, that copyright law never implicates First Amendment concerns, but only that the First Amendment issues that do arise have little to do with copyright duration. Indeed, the most pressing First Amendment question posed by copyright law is precisely the one resolved by the Court in *Harper & Row*: whether political speech concerning recent events not already available in the marketplace of ideas—speech undoubtedly residing at the core of the First Amendment—may be suppressed by an assertion of copyright. If, as *Harper & Row* soundly concluded, the idea/expression dichotomy, the prohibition against copyrighting facts, and the fair use doctrine are sufficient to vindicate First Amendment interests even as to core political speech subject to copyright restrictions, then it is unclear how a First Amendment violation could occur merely because the copyright in question lasts seventy years instead of fifty years from the author's death.

Significantly, none of the First Amendment protections in copyright law on which *Harper & Row* relied is

affected by the CTEA. Just as before, "no author may copyright facts or ideas." *Harper & Row*, 471 U.S. at 547; *see also* 17 U.S.C. § 102(b). Accordingly, the public traffic in ideas remains uninhibited by copyright law, and likewise "[t]he public interest in the free flow of information is [still] assured by the law's refusal to recognize a valid copyright in facts." *Harper & Row*, 471 U.S. at 558 (quoting *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 61 (2d Cir. 1980)). Also unchanged by the CTEA is the preexisting fair use doctrine, which "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (alteration in original) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)); *see also* 17 U.S.C. § 107. So after the CTEA, just as before it, "copyright is limited to those aspects of [a] work . . . that display the stamp of the author's originality," *Harper & Row*, 471 U.S. at 547, and copyright will be disregarded in any particular case if doing so would "serv[e] the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity." Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110 (1990).

Accordingly, heightened First Amendment scrutiny is not appropriate to test the constitutionality of the CTEA.

B. The CTEA Satisfies the *O'Brien* Test

In any event, the CTEA is constitutional under the standard of intermediate scrutiny set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), which petitioners urge the Court to apply. As the Court recently explained:

> Under *O'Brien*, a content-neutral regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."
>
> To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests. "Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

Turner Broadcasting System, Inc. v. FCC ("*Turner I*"), 512 U.S. 622, 662 (1994) (internal citation omitted) (quoting *O'Brien*, 391 U.S. at 377, and *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

1. The CTEA Serves Substantial Governmental Interests

As with their argument relating to the copyright power, petitioners' First Amendment challenge to the CTEA consistently presumes that the statute could be enacted pursuant only to Congress' Copyright Clause authority. Petitioners accordingly recognize only one legitimate and substantial governmental interest potentially advanced by the law: "providing incentives to authors to create original works." Pet. Op. Br. at 40. In fact, however, the primary purpose of the CTEA, as discussed above, is to preserve a favorable balance of trade in copyrighted materials between the United States and foreign nations. Needless to say, the government has a substantial interest in protecting United States industries vital to the nation's economic health when foreign legislation would otherwise create an uneven playing field.

This interest is separate from, and additional to, the substantial interest of harmonizing American copyright law with the laws of its important trading partners to the extent practicable. As explained by the Register of Copyright during legislative hearings on the CTEA, "[t]he Copyright Office believes harmonization of the world's copyright laws is imperative if there is to be an orderly exploitation of copyrighted works. . . . It does appear that at some point in the future the standard will be for life plus 70. The question is at what point does the United States move to this term?" *The Copyright Term Extension Act of 1995: Hearing Before the Senate Committee on the Judiciary*, S. Hrg. 104-817, 104th Cong. 1st Sess. (Sept. 20, 1995) (Statement of Marybeth Peters, Register of Copyright and Associate Librarian of Congress for Copyright Services).

Moreover, as the government persuasively argues, the CTEA's twenty-year term extension advances substantial domestic interests as well. Congress identified two means by which copyright extensions would ultimately result in a richer and more vibrant public domain, and therefore advance the interests protected by the Copyright Clause. *First*, Congress was concerned with the potential disappearance of older creative works stored on analog media subject to deterioration, such as film and audio tape. Converting these works into a digital format would allow them to survive, in principle, in perpetuity, and would therefore make available to future generations a large catalog of creative materials that will otherwise be lost. "However," Congress determined, "to transfer such works into a digital format costs a great deal of money—money which must come either from public or private sources." S. Rep. No. 104-315, at 13. The CTEA addresses this financing problem by granting copyright-owners an additional twenty years of revenues to defray the costs of digitization, thereby increasing the likeli-

hood that digitization will occur. As the Senate Report on the CTEA explained:

> Many of the works we wish to preserve, including the motion pictures and musical works from the 1920's and 1930's that form such an extraordinary part of our Nation's cultural heritage, will soon fall into the public domain. Once in the public domain, the exclusive right to reproduce these works will no longer be protected. Because digital formatting enables the creation of perfect reproductions at little or no cost, there is a tremendous disincentive to investing the huge sums of money necessary to transfer these works to a digital format, absent some assurance of an adequate return on that investment. By extending the current copyright term for works that have not yet fallen into the public domain, including the term for works-made-for-hire (e.g., motion pictures), the bill will create such an assurance by providing copyright owners at least 20 years to recoup their investment. More important, the American public will benefit from having these cultural treasures available in an easily reproducible and indelible format.

S. Rep. No. 104-315, at 13.

Second, Congress considered how best to allocate new and greater-than-expected opportunities for commercial exploitation of creative works, and reasonably concluded that providing these unforseen revenues to authors and creators would be most likely to stimulate production of additional works. When considering the CTEA, Congress was informed by the Register of Copyright that "[t]echnological developments clearly have extended the commercial life of copyrighted works." *The Copyright Term Extension Act of 1995: Hearing Before the Senate Committee on the Judiciary*, S. Hrg. 104-817, 104th Cong.

1st Sess. (Sept. 20, 1995) (Statement of Marybeth Peters, Register of Copyright and Associate Librarian of Congress for Copyright Services). Based on this and other testimony, Congress concluded that "[s]ince 1976, the likelihood that a work will remain highly profitable beyond the current term of copyright protection has increased significantly as the rate of technological advancement in communications and electronic media has continued to accelerate, particularly with the advent of digital media and the explosive growth of the National Information Infrastructure (NII) and the Global Information Infrastructure (GII)." S. Rep. No. 104-315, at 12. "The question," observed the Register of Copyright, "is who should benefit from these increased commercial uses?" Statement of Marybeth Peters, *supra*.

The CTEA implements Congress' judgment that these unforseen revenues should go to authors, creators, and other copyright-owners, since giving additional income to those persons is most likely to promote the "progress of science" contemplated by the Copyright Clause.[14] As Congress explained, "extended protection for existing works will provide added income with which to subsidize the creation of new works. This is particularly

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[14] The Court has been equivocal as to whether it is copyrights that advance "science" and patents that advance "the useful arts," or the reverse. *Compare Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) (federal *patent* power "limited to the promotion of advances in the '*useful arts*,' " (emphasis added), with *Quality King Distribs., Inc. v. L'Anza Research Int'l, Inc.*, 523 U.S. 135, 151 (1998) (the "principal purpose [of the *Copyright Act*] was to promote the progress of the '*useful Arts*' "). This brief associates copyrights with progress in "science," as suggested by the symmetry of the Copyright Clause—"science and useful arts . . . authors and inventors . . . writings and discoveries"—and consistent with the archaic usage of "science" to denote general learning. *See generally* 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* (2002) § 1.03, at 1-66.17 n.1; Pet. Op. Br. at 15 n.4.

important in the case of corporate copyright owners, such as motion picture studios and publishers, who rely on the income from enduring works to finance the production of marginal works and those involving greater risks (*i.e.*, works by young or emerging authors)." S. Rep. No. 104-315, at 12-13.

2. Any Restriction on First Amendment Freedoms Imposed by the CTEA Is No Greater than Is Essential to Achieve the Government's Legitimate Purposes

As discussed above, the CTEA reaches no further than is necessary to achieve Congress' legitimate and substantial objective of eliminating unfair treatment of American copyright-owners when competing for revenues in European markets. *See supra* Part I.B.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

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